No. ___ 06-1[illegible] 2007

IN THE

Supreme Court of the United States

SERGES JACQUES DESCENT
a.k.a. Jack Descent,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. To resolve the conflict between the Appellate Circuits in which the Eleventh Circuit Court of Appeals is the only circuit that limits the tendering of a motion to "Recall a Mandate" filed more than a year after issuance of a mandate unless the Movant first establishes "good cause" for the delay in filing the motion.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, SERGES JACQUES DESCENT ("Mr. Descent"), respectfully prays for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on February 16, 2007.

OPINION BELOW

The unpublished opinion of the Eleventh Circuit Court of Appeals denying Appellant's *pro se* "Motion to Recall and Amend Mandate issued on February 16, 2007, is reproduced in Appendix A hereto.

JURISDICTION

The Court's jurisdiction is invoked pursuant to Title 28 U.S.C. §1254(1). This petition presents this Court with a serious constitutional question as well as a conflict with decisions of the federal appellate and circuit courts as more fully presented below. The question to be resolved centers around whether the Eleventh Circuit's Appellate Rule 41-1(c) is unconstitutional. The instant petition is timely filed and within the 90-day statutory time limitation period.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION: FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION: FIFTH AMENDMENT

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULE OF CIVIL PROCEDURE 59(e)

Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of judgment.

ELEVENTH CIRCUIT APPELLATE RULE 41-1

(b) A mandate once issued shall not be recalled except to prevent injustice.

(c) When a motion to recall is tendered for filing more than one year after issuance of the mandate, the clerk shall not accept the motion for filing unless the motion states with specificity why it was not filed sooner. The court will not grant the motion unless the movant has established good cause for the delay in filing the motion.

STATEMENT OF CASE

I. Procedural History.

On November 21, 2000, a federal grand jury in Tampa, Florida, returned a superseding indictment charging Mr. Descent with one count of conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. §371; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. §1956(h); twenty-six counts of mail fraud, in violation of 18 U.S.C. §§1341, 2326 and 2; twenty-four counts of money laundering, in violation of 18 U.S.C. §1957; and five counts of money laundering, in violation of 18 U.S.C. §1956.

On August 7, 2001, the district court sentenced Mr. Descent to serve a total of 120 months' imprisonment, three years supervised release and pay restoration in the amount of $1,512,774.81.

On May 28, 2002, the Appellate Court entered a published decision affirming Mr. Descent's convictions. *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002), *cert denied*, 537 U.S. 1132 (Jan 13, 2003). The appellate court found, however, that the district court erred in modifying the jury instructions related to the forfeiture, and vacated and remanded the case for entry of a new forfeiture judgment in the lower amount of $1,288,140.00.

On June 18, 2002, the district court issued a new judgment by reducing the amount of forfeiture to $1,288,140.00 without holding a new sentencing hearing.

On January 24, 2007, Mr. Descent filed a "Motion to Recall and Amend Mandate" (see: *Appendix B* hereto) showing that the new forfeiture amount ordered by the Appellate Court placed him in a different Sentencing Guideline range, which would have required Mr. Descent to be sentenced to a lower offense level.

On February 16, 2007, in a one judge decision, Mr. Descent was denied his motion to recall the mandate for failure to present a "good reason why the Court should accept the motion."

On March 5, 2007, Mr. Descent timely filed a motion to alter, amend or correct order pursuant to Federal Rule of Civil Procedure 59(e) and was returned to him the following day unfiled. (See: *Appendix C* hereto).

II. Facts.

During the course of Mr. Descent's Sentencing Proceedings, his attorney vehemently argued the forfeiture amount in question, asseverating that an amount of $400,000 should not be incorporated into the forfeiture amount. Additionally, Mr. Descent petitioned the court for leniency as the forfeiture amount of $1,688,845 was $100,000 over the threshold of $1,500,000 which would add one more level to his Base Offense Level. However, the Sentencing Court departed from these arguments and sentenced Mr. Descent with a Base Offense Level of 30. (By applying the 2000 Sentencing Guidelines, a forfeiture amount more than $1,500,000 and less than $2,500,000 promulgates a B.O.L 30).

In raising this issue on direct appeal, the Appellate Court found that the district court erred in modifying the jury instructions related to the forfeiture, and vacated and

remanded the case for entry of a new forfeiture judgment in the amount of $1,288,140.00.

While readdressing this issue on Mr. Descent's §2255 motion to vacate, set aside or correct sentence, Mr. Descent received correspondence from the U.S. Government advising him that his request for a treaty transfer was being hindered by his §2255 motion, and that he should be vacant of any open court activity to proceed.

Mr. Descent, acting under the language of this correspondence, filed a motion in the District Court to withdraw his habeas claims based on this information regarding his treaty transfer, which was subsequently granted and his motion under §2255 was dismissed. Unfortunately, time revealed that Mr. Descent's treaty transfer was denied.

Mr. Descent then proceeded in the Eleventh Circuit for relief pursuant to Circuit Rule 41-1(b), which Judge Cox denied and refused to entertain his motion under F.R.Civ.P. 59(e). The instant petition followed, seeking this Court's intervention in order to resolve the split amongst the federal circuit courts on the aforementioned question of law as to needing "good cause" pursuant to Circuit Rule 41-1(c) before a motion to "Recall a Mandate" can be heard in the Eleventh Circuit.

REASON FOR GRANTING PETITION

The Petitioner, Mr. Descent, respectfully submits that the Eleventh Circuits' holding that his Motion to Recall and Amend Mandate presented "no good reason why the Court should accept the motion" pursuant to Rule 41-1(c) is unconstitutional, and was wrongly applied in this case as well as creating a definitive split amongst the federal circuit courts. The federal Appellate Rules do not address the requirements for recalling a mandate under its Rule 41.

Accordingly, the Eleventh Circuit is relying on its Circuit Rule 41-1(c) as the basis for their decision which states that "the clerk shall not accept a motion to recall a mandate over a year after issuance unless the movant can show good cause for the delay." However, the eleven remaining sister circuits do not impose this same burden within their rules, and for good reason. Imposition of such a burden limits meaningful access to the courts which would be repugnant to the First Amendment of the Constitution. Access to the courts is clearly a constitutional right, grounded in the First Amendment; the Article IV Privileges and Immunities Clause, the Fifth Amendment; and/or the Fourteenth Amendment. (See: *Christopher v. Harbury*, 536 U.S. 403, 415 n.12, 153 L.Ed.2d 413, 122 S.Ct. 2179 (2002) (noting the Supreme Court's past reliance on all of these bases.))

"The clearest reason for recall or revisitation appellate mandate is to exercise the court's power to recall its mandate—at any time—to correct clerical mistakes, or to make the judgment consistent with the opinion." *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 277 (CADC, 1979); *Kinnear-Weed Corp. v. Humble Oil*, 296 F.2d 215 (5th Cir. 1961); cf. *Klapprott v. United States*, 335 U.S. 601, 616, judgment modified, 336 U.S. 942 (1949). More importantly, however, the recall of an appellate mandate is to avoid an injustice. "The recall of an appellate mandate to avoid injustice is a continuation in the appellate sphere, of a deeply rooted equity jurisprudence." *Greater*, 463 F.2d at 279.

It has been long held that "[a] mandate once issued will not be recalled except by order of the court for good cause shown" and that the "good cause" requisite for recall of mandate "is the showing of need to avoid injustice,[1]" without any indication of a time limit for filing.

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[1] *In re Union Nacional de Trabajodores*, 527 F.2d 602, 604 (1st Cir. 1975); *Calloway v. Marvel Entertainment Group, Div. of Cadence Indus.*

When you juxtapose caselaw and court rules from all the circuits it becomes pellucid that the Eleventh Circuit stands alone when they seek first to establish if your claim is within a certain time period rather than looking directly at the merits to see if there was any element of "injustice" presented at all.

This lack of uniformity in the law and procedure as applied to criminal defendants is a matter which deserves the attention of and resolution by this Court—Nothing less.

Moreover, when Mr. Descent was denied his motion, he timely filed a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), which contained a statement "with specificity why it was not filed sooner" as required under Eleventh Circuit Rule 41-1(c), but was promptly returned by the Circuit Court "unfiled" and the Court refused to entertain it.

Such an action as this clearly violated Mr. Descent's right of due process under the Fifth Amendment and his right to petition the Court for a redress of grievances.

In *Simmons v. Edmondson*, 2006 U.S. Dist. LEXIS 75127 (11th Dist. 2006); *United States v. Battle*, 272 F.Supp.2d 1354, 1357 (N.D. Ga. 2003), it was held that:

> A party may seek relief from a judgment pursuant to either Fed.R.Civ.P. 59(e) or Fed.R.Civ.P. 60(b). A "motion to alter or amend a judgment shall be filed no later than 10 days after the entry of judgment." Fed.R.Civ.P. 59(e). "The courts have delineated three major grounds

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Corp., 854 F.2d 1452, 1476 (2nd Cir. 1988); *Michael v. Horn*, 144 Fed. Appx. 260 (3rd Cir. 2005); *Faulkner v. Jones*, 66 F.3d 661, 663 (4th Cir. 1995); *Gradsky v. United States*, 376 F.2d 993, 995 (5th Cir. 1967); *Hines v. Royal Indemnity Co.*, 253 F.2d 111, 114 (6th Cir. 1958); *Burns v. Clark*, 130 F.3d 782, fn.2 (7th Cir. 1997); *Ruiz v. Norris*, 104 F.3d 164 (8th Cir. 1997); *Thompson v. Calderon*, 120 F.3d 1045, 1048 (9th Cir. 1997); *Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir. 1987); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 277 (D.C.C., 1971).

> justifying [pursuant to Rule 59(e)]: (1) an intervening change in controlling law; (2) the availability of new evidence; [or] (3) the need to correct clear error or prevent manifest injustice."

Mr. Descent met this criteria by satisfying the third prong as his motion showed that he was sentenced 18 months over that which he was adjudicated on. Therefore, it is axiomatic that the court should have considered his claim. Unfortunately, this was not the case. Because Mr. Descent was denied to proceed pursuant to F.R.Civ.P. 59(e), it has caused him actual injury, as the lack of access has hindered his efforts to pursue a legal claim. (See: *Lewis v. Casey*, 518 U.S. 343, 349-51 (1996)).

"The right of access to the courts is founded in the due process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolf v. McDonnell*, 418 U.S. 539, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974), at 941.

Additionally, the right to petition for "redress of grievances is among most precious of liberties safeguarded by Bill of Rights and this right is intimately connected, both in origin and in purpose, with other First Amendment rights of free speech and free press." *United Mine Workers v. Illinois State Bar Ass'n*, (1967) 389 U.S. 217, 19 L.Ed.2d 426, 88 S.Ct. 353.

Clearly, Mr. Descent asserts that the Court's refusal to file his motion under F.R.Civ.P. 59(e) severely undermined his right to due process. From a tradition beginning with King John at Runnymede down to and including the Honorable George Dunbar Prewitt of Greenville, Mississippi, our American notions of simple fairness, not to mention constitutional mandates of due process, dictate that *every* man is entitled to due process of law—even a man with poor

judgment, a vexatious tongue and a venomous quill." *In re Prewitt*, 280 F.Supp.2d 548, 557 (5th Dist. 2003).

In sum, Petitioner asseverates that Eleventh Circuit's Rule 41-1(c) suffocates his constitutional rights to seek redress and access to the courts, by imposing a one-year time limitation unless the movant has established "good cause" for the delay in filing the motion. In *Carrington v. United States*, 470 F.3d 920 (9th Cir. 2006), defendant Carrington was sentenced in 1990 to 324 months for drug-trafficking offenses, the district court described the Sentencing Guidelines as "bad law," and expressed frustration with the limitation on the court's discretion imposed by the Guidelines. When defendant Tillitz was sentenced in 1998 to 360 months for drug-trafficking crimes, the same district court judge noted that he had ruled the Guidelines unconstitutional when they were first promulgated but that the Supreme Court had overturned that ruling. Both sentences were upheld on appeal. In 2005, after the decision in *U.S. v. Booker*, 543 U.S. 220 (2005), Tillitz filed a petition for a writ of *audita querela* seeking relief from his sentence, and Carrington moved for modification of his sentence. The sentencing district court judge denied both motions, but asked the court of appeals to recall its mandates so that the court could resentence the defendants. The Ninth Circuit held that the two cases presented "extraordinary circumstances" that justified recall of the court's mandates from the defendants' earlier appeals so that the district court could resentence the defendants.

Using *Carrington* as an example, a showing of good cause was made and, sixteen (16) years later, the court recalled its mandate so the defendants could be resentenced. Likewise, Mr. Descent should have received the same considerations as Carrington.

Moreover, it would be safe to draw an inference that had Petitioner been in the Ninth Circuit (or any other circuit for that matter) his motion would have been more efficacious

than that of the Eleventh Circuit. Petitioner additionally recapitulates that his denial to submit relief under Fed.R.Civ.P. 59(e) was in violation of the Due Process Clause of the Fifth Amendment.

Under these circumstances, review is necessary by this Court to resolve this split between the Eleventh Circuit and the other sister circuits as to "limiting" the time in which to file a motion to Recall a Mandate. As noted, the Federal Appellate Rules do not limit when a motion to recall a mandate must be filed into court. Mr. Descent seeks relief from this Court and asks for a ruling that the Eleventh Circuit Rule 41-1(c) be held unconstitutional and that the Appellate Court recall its mandate, so that he may be resentenced consistent with the new forfeiture amount.

CONCLUSION

WHEREFORE, the Petitioner, SERGES JACQUES DESCENT, requests this Court to grant the instant petition for writ of certiorari, declare the Eleventh Circuit Rule 41-1(c) unconstitutional, and the Appellate Court recall its mandate so that Petitioner may be resentenced consistent with the new forfeiture amount. Mr. Descent further requests other relief this Court deems proper and just.

Respectfully submitted,

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